No. 11400

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TITUS CORBETT, MARTHA WOODS CORBETT and LOTTIE FRANK, Administratrix of the Estate of Levi Frank, Deceased,

Appellants,

vs.

JOHN C. WILKERSON,

Appellee.

Brief of Appellants

On Appeal from the District Court of the United States for the Eastern District of Washington Southern Division

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Residence: Moscow, Idaho

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Jurisdiction

These actions were commenced in the District Court of the United States for the Eastern District of Washington, Southern Division (R. 2).

Lottie Frank, as administratrix of the estate of Levi Frank, deceased, brought her action against the defendant, John C. Wilkerson, for the wrongful death (R. 3-4) of her husband, Levi Frank.

Martha Woods Corbett brought her action against John C. Wilkerson for injuries by reason of the same automobile accident (R. 2-3). Upon the trial of the case, Titus Corbett, the husband of Martha Woods Corbett, was added as a party plaintiff.

Jurisdiction is founded upon diversity of citizenship, the plaintiffs being citizens and residents of the State of Idaho, and the defendant being a citizen and resident of the State of Washington. The amount in controversy is more than three thousand dollars (R. 234).

The two causes arising out of the same accident, such cases were consolidated for trial and tried before the Honorable Sam M. Driver, Judge of such United States District Court, at Yakima, on May 8 and 9, 1946 (R. 9-10), very shortly after his appointment to such position. At the conclusion of the trial, the court entered findings of fact and conclusions of law favorable to the defendant (R. 233 to 235) and entered judgment thereon (R. 236-237).

Notice of appeal was filed by all plaintiffs on the 27th day of May, 1946 (R. 237-238). The record on appeal was certified by the Clerk of the District Court on the 25th day of July, 1946 (R. 246). The jurisdiction of this court is invoked under Sec. 128 of the Judicial Code as amended, 28 U. S. C. A., Sec. 225 (a).

Statement Of The Case

On the morning of September 9, 1945, about 1 o'clock A. M., Titus Corbett, Martha Woods Corbett, Levi Frank, Roy Whitaker, Jane White, and Rachel Wilson, were proceeding westward by automobile on the north shore of the Columbia River approximately 28 miles west of Goldendale, Washington, returning by way of The Dalles, Oregon, to Celilo, Oregon, where they have fishing rights as Nez Perce Indians.

The driver parked the car on a turn-out, and the ladies went east of the car and out of sight for the purpose of attending to the duties of nature. When the ladies were returning to the car, they joined Levi Frank, who apart from the ladies had also taken advantage of the stop.

John C. Wilkerson, the appellee, and his party, consisting of his wife, Mr. and Mrs. Chittester, and Mr. and Mrs. Monahan (R. 176-177), who had spent the evening at The Dalles in night clubs and having "quite a few drinks," (R. 209), came up the highway proceeding eastward, returning to their home at Wishram, and ran into these people, killing Levi Frank, and severely injuring Martha Woods Corbett.

The stories as to how the accident occurred differ. Appellee and his witnesses say that Levi Frank, Martha

Woods Corbett, and the other one or two (R. 196-216-218-220) (the stories differ) were within three feet of the center line of the highway when struck by the automobile. Appellee said he was blinded by the light or lights of a standing car but proceeded at highway speed (40 to 45 miles per hour), maybe slackening five miles per hour, until he was so close that he could not stop (R. 204-205). He then turned his car to the left into these people, killing one and injuring the others. The damage to the automobile shows they were struck by the right front fender (R. 212). The blinding lights on the standing automobile could only have been those of the appellee's witness, Merrill. The car in which appellants' people and witnesses had been riding was parked some distance from the accident and off the road.

The appellants' witnesses say that they were walking westward single file on the south shoulder of the highway and that appellee's car swerved on to the shoulder and ran into them (R. 58-59), killing Levi Frank and injuring the other three.

The body of Levi Frank and the person of Martha Woods Corbett were both thrown beyond the shoulder and into the ditch on the south side of the highway (R. 59).

The road at this point was straight (R. 12-13); the

weather was clear and dry (R. 12). The crown of the road was black top. The width of the black top was 19 feet 6 inches. The shoulder on the road was gravel and dirt and three feet wide. There was a center line in the highway. (R. 12). In the direction from which the appellee approached the scene of the accident, he had a clear view from a distance of 272 feet (R. 15). At the scene of the accident there were skid marks of appellee's car, beginning close to the south shoulder and continuing across the highway to the north. The length of such skid marks was 63 feet (R. 14). Appellee was driving his own car. There were three people in the front seat and three in the rear. The court, in deciding the case, based his decision upon whether or not the deceased and injured person were on the shoulder of the road or on the pavement. His decision was based upon the statement of Gordon E. Hyland, "I saw no indication of any vehicle travel on the shoulder of the road." (R. 105). Mr. Hyland had also testified that a truck and tractor and other vehicles had been on the shoulder of the road (R. 18), and Titus Corbett, a witness for the appellants, had testified that a large number of people had walked over the shoulder of the road before Mr. Hyland arrived at the scene of the accident, and that the person of Martha Woods Corbett was loaded into an ambulance over such shoulder (R. 225-226). It is apparent from the testimony that the usual curious persons who

stop to look at an accident had also been there before Mr. Hyland, the State Patrolman, arrived.

There is no testimony to show that it would have been possible for Mr. Hyland, under conditions existing, to have detected tire marks upon the shoulder even if a vehicle had passed over it.

Questions Presented

1. Whether or not the driver of an automobile may with impunity run into and injure or kill persons standing or walking upon a public highway of the State of Washington unless such persons are upon the shoulder of the highway.

2. Whether or not a pedestrian is guilty of negligence as a matter of law, if he is upon any other portion of a Washington highway than the shoulder thereof.

3. Whether or not there is any substantial and believable evidence to show that the deceased and Martha Woods Corbett were on the travelled portion of the highway at the time of the injury of Martha Woods Corbett and the death of Levi Frank.

4. Whether or not the appellee, John C. Wilkerson, was guilty of negligence as a matter of law, if and when driving while blinded by the lights of another car so that

he could not see and observe the roadway where he was travelling.

Specifications Of Error

I.

The court erred in making Finding of Fact No. 3, as follows:

> "That at the time and place of said accident the defendant John C. Wilkerson was operating his car in a careful and prudent and legal manner and was in no wise negligent." (R. 234),

the evidence showing that the roadway was open for 272 feet, and his own testimony being that he did not slack his speed of 35 or 40 miles an hour more than 5 miles an hour, although he could not see because of being blinded by the lights of a standing car, and that he ran into a party of four people on an open unobstructed highway after he had admitted "quite a few drinks," and when he was out of his lane of traffic (R. 215-135).

II.

The court erred in making Finding of Fact No. 4, as follows:

> "That at the time and place of said accident the decedent Levi Frank and the plaintiff Martha Woods Corbett were guilty of negligence in failing to walk

> upon the extreme left hand side of the highway as required by Sec. 6360-101 of Rem. Rev. Sts. of the State of Washington, and in failing to observe the position of defendant's car and to step to the left of the paved portion of said highway as required by said section." (R. 235),

there being no evidence in appellants' testimony to show that such persons were on the travelled portion of the road, and the appellee's testimony indicating that such persons were crossing the roadway in such a position as to be unable to step off onto the shoulder.

III.

The court erred in granting judgment for the appellee and in failing to award damages to appellants.

Argument

In presenting our argument, we recognize the rule that in appealing from the finding and decision of a court sitting without a jury, if there is any substantial evidence which can be taken to support the findings and decree, the appellate court is required so to do.

It is our position that if the trial court had not misinterpreted the law it would have found for appellants under such of the evidence as was accepted and acted upon.

Having tried the matter before a court, we should not be placed in a more difficult position than in a trial before a jury.

The decision of the court shows what would have been the instructions to a jury, and we believe such instructions would have been prejudicial and cause for reversal.

We shall, however, follow in our argument the questions presented:

I.

Duty Of Motorist In Washington

> "Whether or not the driver of an automobile may with impunity run into and injure or kill persons standing or walking upon a public highway of the State of Washington unless such persons are upon the shoulder of the highway."

It was the appellee's position, followed by the decision of the court, that the only question presented was whether or not these persons were on the highway or on the shoulder of the highway. It was the appellee's position at the trial of the cause that any pedestrian in the State of Washington who dares upon a public highway farther than the shoulder thereof may be killed or injured by an automobile, and the driver of the automobile is liable under no circumstances. It was the position of the appellee and the Judge of the District Court that it made no difference that

the driver of the automobile was under the influence of intoxicating liquor, that he was driving his automobile not seeing that which he was required to see, that he was driving into lights of a standing car through which he did not see, and that he killed and injured.

The sole law presented was Section 6360-101, Rem. Rev. Stat., in the following words:

> "Pedestrians on any public highway where a sidewalk is provided shall proceed upon such sidewalk. Pedestrians on any public highway where no sidewalk is provided shall proceed on the extreme left-hand side of the roadway and upon meeting an oncoming vehicle shall step to their left and clear of the roadway."

It was the appellants' evidence that the person killed and the person injured were upon the shoulder of the highway. It was appellee's evidence that the person injured and the person killed were within three feet of the center line of the highway. It was appellee's evidence that placed a standing automobile near where the accident occurred, which standing automobile had such blinding lights that appellee was unable to see more than a portion of the highway. It was appellee's evidence that "we had quite a few drinks," (R. 209). Appellee himself testified that he was travelling upwards of 35 or 40 miles per hour (R. 204), that he reduced his speed 5 miles an hour, but did not

reduce it 10 miles an hour (R. 205), that he was blinded by the approaching lights so that "I could see a small part of the highway at that time." (R. 205). The evidence showed that the last obstruction approaching the accident upon the highway was a small rise in the road 272 feet from the scene of the accident. From that point to where appellee ran into and killed Levi Frank and injured Martha Woods Corbett, the road was open and dry, the weather was clear, and there were no obstructions to his view.

In spite of this testimony of driving while blinded, of running into several persons in the middle of the highway, of driving after he had had "quite a few drinks," he was free of negligence and could kill and injure without liability. We submit that such is not the law of Washington or any other state, and that for this reason the finding and decision of the court is wrong and should be reversed.

II.

Rights Of Pedestrian

> "Whether or not a pedestrian is guilty of negligence, as a matter of law, if he is upon any other portion of a Washington highway than the shoulder thereof."

This question is also based entirely upon the Washington Statute 6360-101 Rem. Rev. Stat. The statute seems unique and in no wise deals with the rights of pedestrians

to cross a public highway or to make any lawful use of the same as pedestrians except to proceed on the extreme left-hand side facing oncoming traffic. It was appellee's position and the court's position that such statute entirely did away with all pedestrian rights on the Washington highways except that one.

We believe that a proper statement of the law is that a far greater degree of care is required of a motorist than of a pedestrian.

> Pinello v. Taylor, 17 P. 2d 1039, 128 Cal. App. 508;
> Cleveland v. Petrusich, 3 P. 2d 384, 117 Cal. App. 71;
> De Greek v. Freeman, 291 P. 854, 108 Cal. App. 645.

And certainly a motorist is required to anticipate the presence of pedestrians upon a highway (Coursault v. Schwebel, 5 P. 2d 77, 118 Cal. App. 259), especially near parked automobiles.

We believe that the court's interpretation of the law is not permissible and that the court's finding thereunder, that Levi Frank and Martha Woods Corbett were guilty of contributory negligence, was without basis.

The court's finding, according to his own statement, was based entirely upon the testimony of Mr. Hyland, the State Patrolman (R. 228), the court saying:

> "His testimony was that skid marks started about two feet inside of the paved portion of the highway and that there was no evidence of any travel or that the car had encroached upon the gravel shoulder which was three feet wide."

Mr. Hyland's testimony was that there had been other vehicles upon the shoulder of the highway (R. 18), but his only testimony in relation to vehicle travel upon the shoulder of the highway was:

> "I saw no indication of any vehicle travel on the shoulder of the road." (R. 105).

Appellee's attorney did not attempt to determine from the highway patrolman or any other person whether or not vehicles on that particular kind of a shoulder would leave marks. It was and is appellants' information and argument that they would not. It is a matter of common knowledge that many highway surfaces, including rock and gravel, do not under all conditions show the tire marks of a car unless the wheels are skidded thereon. It is our contention that the appellee drove his car out upon the shoulder of the highway, killing Levi Frank, injuring Martha Woods Corbett, and hitting their companions, and, swerving to the left, applied his brakes as quickly as he felt the impact, starting his skid marks about two feet inside the hard surface of the roadway, and continued across the same for 63 feet; that the body of Levi Frank

and the person of Martha Woods Corbett were thrown into the right-hand ditch eastward from the shoulder of the highway. The body of Levi Frank and the person of Martha Woods Corbett could not have been thrown to such positions from the point farther east where the skid marks crossed the center line of the highway.

III.

Sufficiency Of Evidence

> "Whether or not there is any substantial and believable evidence to show that the deceased and Martha Woods Corbett were on the travelled portion of the highway at the time of the injury of Martha Woods Corbett and the death of Levi Frank."

We find that we have already made some argument in regard to this question. The relation of the positions of the bodies corresponds more acceptably to the beginning of the skid marks than to the point where the skid marks cross the center line of the highway. The shoulder was three feet wide. The travelled portion of the highway was 19 feet 6 inches. Appellants' testimony and evidence was to the effect that they were upon the shoulder of the highway when hit. Appellee's testimony and evidence showed the persons to have been struck within three feet of the center line of the highway the car first swerving partly across the center line of the highway (R. 215-135),

then hitting Levi Frank and killing him, and hitting and severely injuring the person of Martha Woods Corbett.

If we would take appellee's testimony as true, and we do not, it would indicate that had appellee been sober, in control of his senses and acting properly, he could have turned to the right and passed these persons without injuring them. At that point he had six feet of black top and three feet of shoulder to the right of the position where he places the deceased, appellant Martha Woods Corbett, and their companions upon the highway.

The court entirely disregarded the testimony of Dr. Vogt, who testified "that gravel and sand and weeds" (R. 109) were ground into the soft tissues of the foot of Martha Woods Corbett. All of the testimony shows that the surface of the road was hard black top clear of sand, gravel and weeds. The only manner in which sand, gravel, and weeds could have been ground into the soft tissues of that foot through the outer skin, was for the foot to have been run over by a wheel of the automobile on the shoulder of the road.

IV.

Whether Appellee Was Guilty of Negligence As Matter Of Law

> "Whether or not the appellee, John C. Wilkerson, was guilty of negligence, as a matter of law, if and when driving while blinded by the lights of another car so that he could not see and observe the road where he was travelling."

It has long been recognized that a motorist who drives where he cannot see is guilty of negligence. This rule is applicable where he drives heedlessly into blinding lights.

Before one can be excused in the doing of that which constitutes negligence because of diverted attention, there must be some showing of the existence of a fact, condition or circumstance which would ordinarily divert the mind and attention of the vigilant.

> Sanderson v. Chicago, M. & St. Paul Ry. Co., 167 Iowa 90, 149 N. W. 188.

The duty to keep a proper lookout implies the duty to see what is in plain view, and the driver must operate his vehicle with reference to pedestrians and conditions he should see in the exercise of reasonable care.

> Johnson v. Herring, 300 P. 535 (Mont. 1931).

To continue driving a car when blinded by lights of

other cars is negligence in and of itself. The court, in Jaquith v. Worden, 73 Wash. 349 (at page 358), 132 P. 33, aptly elaborated on this question as follows:

> "He (referring to one defendant) said that he was so blinded by the rays of the headlight of the approaching street car that he could not see ahead; that he could not have seen a person, and that he did not see the machine until he struck it; that he was then thrown from his seat, his foot striking the lever, causing the car to increase its speed. Under his own testimony he was guilty of most pronounced negligence. He was proceeding in utter disregard of the presence of other travelers or objects ahead of him. Had he been without eyes or had he closed them, he would have been in no worse position. To proceed at all in the face of those conditions was at his peril."

The court, in Trainor v. Interstate Construction Co., 187 Wash. 146, 60 P. 2d 7, cites the foregoing decision with approval and quotes therefrom.

The same rule is announced in Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027, as follows: Under a statute requiring a person driving an automobile on a public highway to drive it in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, a driver is negligent if, on a dark

night, with a dark roadbed, he continues to travel at 20 or 25 miles an hour after his vision is obscured by the glare of the lights on an approaching car, so that he can see no object in front of him.

It was the testimony of the appellee that he was blinded by a light,

> "Q. Did it blind you, or didn't it?
> "A. It did blind me." (R. 203).

and further

> "Q. And could you see the road when that light blinded you?
> "A. I could see on the shoulder of the road.
> "Q. But you couldn't see the middle of the road while that light was blinding you?
> "A. Well, I could see for a short ways, not a normal distance.
> "Q. How far?
> "A. Well, it was just a short distance past the car.
> "Q. I mean, was it ten or twelve feet?
> "A. Yes, something like that." (R. 203).

He further testified:

> "Well, it was just after I passed the car with a light on that I saw the people in the road, which would be a very short distance." (R. 203).

In other words, the District Judge found that this man

who was driving at least 35 miles per hour (and his own wife testified to a higher rate of speed) where he could not see, after having "quite a few drinks," was operating his car in a careful, prudent and legal manner and was in no wise negligent (R. 234). We submit that such a decision cannot be supported by this court.

V.

Conclusion

In conclusion, appellants respectfully contend that this cause should be reversed and that damages be awarded to appellants.

Respectfully submitted,

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